Consumer Finance Monitor (Season 4, Episode 30): The CFPB's Summer 2021 Supervisory Highlights: A Close Look at Deposit, Auto Servicing, and Payday Lending Issues

Speakers: Alan Kaplinsky, Chris Willis, and Jason Cover

Alan Kaplinsky:

Welcome to Consumer Finance Monitor podcast, where we follow important recent developments in the consumer financial services industry. A lot of our content that we provide to our clients and to members of the public is contained in our blog, which also goes by the name of Consumer Finance Monitor. I would commend the blog to your reading, and I think it would be wise for you to subscribe to it. We've been doing the blog now for, actually, it's exactly 10 years today. It's actually the 10 year anniversary of the blog. We launched it contemporaneously with the full operation of the CFPB on July 21, 2011. So, let me, first of all, introduce our two speakers today. I'm Alan Kaplinsky. I'm senior counsel at Ballard Spahr, formally the chair of the Consumer Financial Services group.

Alan Kaplinsky:

And at the end of last year, I was pleased to turn the reins over to two people, one of whom will be presenting today. So let me introduce to you, Chris Willis. Chris is co-chair of the consumer financial services group. Prior to that, he was chair of the litigation part of the consumer financial services group. And his practice focuses to great extent on supervisory and enforcement issues, particularly at the CFPB. So it would be appropriate, of course, to have Chris as a guest today, because that's what we're going to be talking about. So Chris, a warm welcome to you.

Chris Willis:

Thanks a lot. And, Alan, it also almost exactly coincides with my ten-year anniversary at the law firm too.

Alan Kaplinsky:

Wow. Okay. Yeah, I can't remember. Did you come before the CFPB got stood up or was it right after that?

Chris Willis:

It was about 10 days afterwards.

Alan Kaplinsky:

Okay. Okay. And also, let me introduce to you the newest partner in our consumer financial services group, Jason Cover. Jason, again, is a consumer financial services lawyer and focuses more on the regulatory side than on the supervisory and enforcement side. But of course, as is the case with all of the people on our group, we don't make these sharp demarcations. Everybody gets involved in of the full array of consumer finance, legal activities. So Jason also will be talking about a couple of subjects, which I'll mention in a moment, dealing with CFPB supervision. So, Jason, also a warm welcome to you today.

Alan Kaplinsky:

Okay. So, the consumer financial marketplace saw a significant impacts from the COVID-19 pandemic that began in March of last year. The CFPB adapted its work by focusing approximately half of its supervisory activities; so-called prioritized assessments, which have began in May of last year. Prioritized assessments were designed to obtain real-time information from a broad group of supervised entities that operate in markets that were posing elevated risks to consumers due to pandemic-related issues. And indeed, there was a whole issue of the CFPB supervisory highlights that focused on prioritized assessments. That's not what we're going to talk about today. What we're going to talk about today is the most recent edition of supervisory highlights. It's actually issue 24, summer 2021, and its additional supervisory highlights that is 47 pages in length.

Alan Kaplinsky:

And as a result of that, we're dividing it into three segments and we're going to be covering one of the three segments today. And what we're going to cover are things identified by the CFPB in the deposit taking area, auto finance servicing, and finally, payday lending. And we're going to go back and forth between Chris and Jason. And want to start first with you, Jason, if we could, and the topic will be deposits. Is it my imagination here, Jason, but it seems like the CFPB is devoted, what I'd call a disproportionate amount of space in the supervisory highlights to deposit taking and issues that they don't like that they've identified. And some of these issues, they seem a little bit frustrated about, because they have reminded the banking industry that they... some of these things are things they've said to the industry multiple times and the industry just doesn't seem to... it doesn't seem to sink in. So, well, what's going on here?

Jason Cover:

I think you raise a really good point and it's immediately noticeable when you look at the page count and the table of contents. And I agree with you. It's not entirely clear, but I think there's some real concern that the CFPB intends a more intensive focus around the practices of deposit taking institutions as to Reg E and related areas. In one sense, these violations read like a laundry list of technical, and maybe one might even call them hyper-technical regulation, Regulation E error resolution procedures. But as you noted, they're hammering in on this. They said they've noted the very same issues in the fall 2014, summer 2017 and summer '22 supervisory highlights. And this also comes on the heels of the CFPB's June compliance FAQ on electronic fund transfers.

Jason Cover:

So I think there's, kind of reading tea leaves, I don't think it would be out of line to think that the CFPB may be indicating that they're going to have an increased focused on these various issues. And again, but it countervailingly on the whole, the supervisor highlights noted they were, the financial institutions self-corrected, self-mediated or otherwise solve these on their own without any additional action by the CFPB with one specific exclusion, and that was overdraft enrollment practices. The CFPB noted violations that were stemming from charging consumers overdraft fees for ATM one-time debit card transactions without obtaining the consumers' affirmative consent. And I think why this one is, I would call it specifically, it was noted not only in the general discussion in the deposit section, but there's also at least one public enforcement action here.

Jason Cover:

So, on that public enforcement action, I think there's a little bit of extenuating circumstances because the CFPB at least alleged the failure to obtain the affirmative consent along with some UDAAP violations that were alleged, saying that the financial institution marketed these overdraft services as free features or packages. So, there's a little bit of heightened scrutiny there, but they also know that other violations related to opt-ins including failure to obtain the consent. Here they noted there was coding and system errors that were resolved, failure to advise consumers the right to revoke. This one actually did result in an MRA. So again, a little bit of heightened scrutiny on this. Failure to obtain evidence of affirmative consent for the opt-in and failure to use forms... I'm sorry, failure to use opt-in notice is essentially comply with the model forms.

Alan Kaplinsky:

Yeah. I'm going to make an observation here, and well first, and then get your reaction to that, and see if you think this presages a much more deeper dive by the CFPB into overdraft practices. So you mentioned the opt-in procedure and of course the Dodd-Frank Act mandated the companies that were charging certain kinds of overdraft fees had to give consumers a right to opt in. And, but they have yet not none, at least to my knowledge, there there's nothing in these highlights, and I don't think they've ever brought an enforcement action where they've actually challenged certain operational aspects of how overdraft fees are sometimes assessed. Different things that banks may do to maximize the amount of overdraft fees like dealing with the reordering of debits in a way from high dollar amount to low dollar amount.

Alan Kaplinsky:

And by doing that to maximize overdraft fees, or doing a variety of other things related to overdraft fees. It seems like every time I look around now I'm still continuing to see the filing of new class actions that pertained. None of them, to my knowledge, are really dealing anymore with the opt-in issue, but they're dealing with all kinds of operational issues where they think banks are acting unfairly. And what I'd like to see is number one, do you share that observation? That CFPB has stayed away from that for now, but a greater concern of me is I think this could be the wall before the storm. I have a feeling that they are going to dive into the operational issues, and I'm not sure if they're going to do it by promulgating or regulation or whether they'll be using UDAAP. So I'd like to get your reaction to both things.

Jason Cover:

Yeah, and I totally agree. I think despite those practices being widely criticized and litigated, there is nothing here and I'm not aware of anything from the CFPB specifically calling out those things like reordering and whatnot to garner higher fees. Again, it's somewhat, it's almost tedious to read these, because these are procedural, technical violations, with the exception of that enforcement and the UDAAP claim intertwined in it. These seem like garden-variety your system's broke down, fix them type of things. But I tend to agree with you that does this represent just a focus on these practices general. Is the CFPB gathering information. If they're doing this deep dive into technical procedures of a bank, there's no reason they couldn't be looking at other things at the same time.

Alan Kaplinsky:

Yeah. I'm going to invite Chris to comment on my observation too. I'm wondering what you think this all portends in the overdraft area, Chris.

Chris Willis:

What I think it portends is the CFPB's use primarily of supervision and enforcement to put pressure on overdraft. Overdraft seems to have become a favorite whipping post of consumer advocates. We've already seen a number of large banks significantly changed their overdraft practices, either eliminating it or different things like that. And so any bank that remains in it, I think, is going to be pressured to join the club of those who have changed their overdraft products or eliminated them voluntarily. So, and I think that pressure will be exerted through supervision and through enforcement, not through rule-making or anything like that.

Alan Kaplinsky:

Yeah. Rulemaking takes too long, right?

Chris Willis:

Correct. And it would two or three years, and that take does, as you said, take too long.

Alan Kaplinsky:

Yeah. Yeah. Okay. So, let me go back to you, Jason. You said that a lot of the stuff that's in the supervisory highlights seems hyper-technical. Can you just give our listening audience a flavor for...I don't want you to go through the whole litany of things that they criticize, but what kinds of stuff are we talking about here?

Jason Cover:

Alan, and I think most of the listening base will find these as no brainers essentially, right? They're saying entities violated Regulation E for requiring written confirmation of an oral notice before they would investigate it, making consumers contact their merchants to try to resolve issues, using incorrect dates for calculating the timeliness of an EFT error notice, failing to provide an accurate explanation of an investigation, or failing to provide an investigation statement altogether. There's a little bit more detail on failure to timely investigate errors, failure to conduct reasonable investigations and failure to properly remediate errors. And there's some provisions, I'm sorry, some references to issuing provisional credit, but again, these are things that if you just read through Reg E on the whole, I don't think anything's surprising. These aren't exotic theories of law here.

Alan Kaplinsky:

Right, Right, right. So, final question before we turn to a new subject. What should deposit taking entities or banks be doing in response to what the CFPB is done here? Is this a good opportunity, Jason, for a bank, either through the use of their in-house resources or by hiring a firm like us to go through a checklist of Reg E and deposit taking issues to make sure that they're in full compliance?

Jason Cover:

Yeah, Alan, I think, first and foremost, and again, this wouldn't be shocking for anyone that's been listening. I would say dust off your overdraft enrollment practices, make sure you're properly documenting it, retaining it, make sure it matches the model form, make sure there aren't any surrounding statements like that it's a free service or something that might indicate that. That seem to be a particular focus, and to you and Chris's point, I think it might be vital now to check the back end as well and see how you're calculating fees and applying them and so on and so forth. So I really think that is, if there was one takeaway from these supervisor highlights, I think that would be it. And my other thought was, and I think you alluded to this in some fashion at the beginning, Alan, the last year has been challenging for everyone due to the COVID crisis.

Jason Cover:

And I just noted like a lot of times they stated, there were employee training issues, CMS issues and system errors. And I do wonder if this is indicative of lack of staffing, turnover, staffing issues generally that were generated by the COVID crisis. I know we've had a number of clients that have called with mini... I'll call them mini crises that occurred just because they didn't have enough people to process calls or similar functions, or they cost system errors because things just broke down and they didn't have anyone to fix them. And on some level, I do wonder if some of these issues are stemming from those types of issues. And I think people are getting more fully staffed now and we're all used to working in this environment.

Jason Cover:

But I do, whether it's getting someone outside to come in and go through an audit and make sure your policies and procedures and FAQs and what are up to snuff. I think there's an opportunity here to address training, CMS issues, audit monitoring just because there are likely so many new faces in any given entity, that there's people learning on the fly on some level, which obviously causes things to break down.

Alan Kaplinsky:

So, thanks, Jason. I will be back to you in a few minutes to talk about another topic, but let me turn to Chris. Chris, before we get into the area of auto servicing, I know you've done a lot of work with clients, some of them new to the firm, some of them long time existing clients on getting them ready for what we've described as the new CFPB; the CFPB under the leadership of Dave Uejio as acting director, but likely to soon be under the leadership of Rohit Chopra. And I know that you and others in our firm have identified hot button issues to be looked at. I assume you've got some new hot button issues to add to those reviews that you're doing. Am I right, Chris?

Chris Willis:

Yes, although honestly, they're not that surprising because the issues that are pointed out with respect to auto finance in this edition of supervisory highlights were things that we had already seen; the CFPB concentrating on in previous exams or in enforcement actions. So we know that that emphasis is correct on a continuing basis, but it's honestly not new. It's stuff that they had already signaled us on.

Alan Kaplinsky:

Yeah. The first topic that I'm going to ask you about seems like it goes back to decades ago when you were probably a baby consumer financial services lawyer, right? Force placed collateral protection insurance. Why don't you describe first for our audience what that. It's sometimes referred to as CPI?

Chris Willis:

Sure. So in any credit product that is secured by some property. So like auto finance or mortgage, things like that, it's very typical and it's permitted by law for the creditor to require the consumer to keep the property insured. So if the car goes off of a cliff or the house gets hit by a meteor, then the lender isn't left unsecured essentially. That's a legitimate interest for the creditor. And so if the consumer doesn't do what he or she is supposed to do and keep the property insured, that's the collateral for the credit extension, then the lender has the option of force placing insurance on the collateral, that is buying insurance itself to insure the property and then charging the consumer for the cost of it. And so this is a regular feature of many types of credit products.

Chris Willis:

And you're right, it's been an area of litigation and regulatory attention for a really long time both in personal property, secured personal lending. In mortgage lending, there were a lot of forced placed insurance cases during the mortgage servicing litigation boom after the 2008 recession. And then the CFPB, just in the last couple of years, did a large consent order, dealing with the forced placement of collateral protection insurance in the auto finance area. So the fact that this is now a topic again in supervisory highlights shouldn't come as a surprise to anyone.

Alan Kaplinsky:

Yeah. And it's a hot button issue because the premiums, I assume, for a CPI are pretty high and probably a lot higher than the premiums that consumers were paying when they maintain their own insurance.

Chris Willis:

Yeah, that is typically the case. And the reason for that is when you apply for your own auto insurance coverage, the auto insurance carrier has access to a lot of information about you Like, how many wrecks have you had? How many claims have you had? How many speeding tickets have you had? Potentially things like that. And so they can underwrite you individually with regard to your level of risk. When the lender is buying insurance to cover its collateral under a retail installment sales contract, the insurance carrier doesn't have the ability to underwrite the individual who's driving the car. And so it ends up being priced to reflect the fact that they'd have less information about underwriting. And you're right, it is significantly more expensive than if you buy your insurance by yourself most of the time.

Alan Kaplinsky:

Right. So, what are the... There are a lot of things that the CFPB has identified that they don't like about collateral protection insurance practices. I'm wondering if you could just rattle off some of the areas that they identified.

Chris Willis:

Well, there were two things in this edition of supervisory highlights, and neither of them is honestly all that surprising or even controversial. And so I think the big takeaway message for us at the end of this is not going to be, hey, pay attention to these specific practices. It's really understand that the CFPB is going to pay careful attention to perfect execution in all aspects of a collateral protection insurance program, and any error you make will potentially result in some sort of action by the bureau. So here's the two issues that they identified. And again, this is not surprising stuff. So one observation was that servicers; auto finance servicers didn't have a good enough system of tracking whether consumers had their own insurance or not. And so consequently, they were alleged by the bureau to have purchased and charged consumers for collateral protection insurance when in fact they had their own insurance in place. So the CPI was duplicative and unnecessary.

Chris Willis:

And in fact, they didn't have a contractual right to place it because the consumer had his or her own insurance. So that's kind of a no brainer, that the contract says, if you don't have your own insurance, we'll buy it for you, but they were buying it anyway according to the CFPB. So, that was one of the observations. And the other one, which is very similar, had to do with force placing CPI on contracts even after a repossession. So CPI policies typically will not cover a car after it is repossessed because once the car is in the possession of the auto finance company, it has a group umbrella insurance policy to cover all of the repossessed vehicles that are in the process of being remarketed that are in its possession. And so the CFPB will said, well, hey, you bought CPI for periods after which you had the car and there was no coverage, but yet you charged the consumer for it anyway.

Chris Willis:

And again, that's not revolutionary. It's not surprising that we would find a violation under circumstances like that. So, we can tell everybody in the industry, don't do those things, which I think is fairly obvious anyway, but I think the bigger message from us to the industry is when you have a CPI program, which some auto finance companies do and others don't, you better make sure that every aspect of execution of it is as buttoned up as it can be, because the CFPB is looking for problems like this, because it is a disfavored product.

Alan Kaplinsky:

Yeah. Yeah. They clearly don't like CPI. And if they had the authority to do it, they would probably ban it all together. But is this so often the case with the CFPB? They figure out, when they don't have the authority, they figure out little ways around that. We refer to is as pushing the envelope.

Chris Willis:

Yeah. Correct. You and Rich Cordray, both.

Alan Kaplinsky:

Yeah. And they do it like there is a... they can't impose a usury ceiling, but yet there've been many companies they've gone after who have charged an interest rate in excess of that, a lot of under state law. And they've gone after those companies claiming that they were collecting an unlawful debt, and it was either an unfair or deceptive or abusive practice, or violated a provision of the fair debt collection practices act. So, Chris, they also, in this area of auto servicing, identified a couple of payment processing issues. Wondering if you could tell us about what they were.

Chris Willis:

Sure. So, and again, this is something that I don't know that the CFPB has been that public about in the past, but we've assisted clients with other CFPB exams in the auto finance area where these kinds of payment processing issues were very prominent in the Bureau's attention and resulted in PAR letters or findings in supervisory letters or reports of examination, but didn't make it out into the public in those previous instances but now here they are. So when I saw this, again, it wasn't that surprising, but it should serve as a reminder to us that the CFPB is very, very focused on payment processing in auto finance, and honestly, across all product types. We see it in all product types, because errors in payment processing can cause impacts for consumers. They can create late fees or delinquency to be reported to a credit bureau or repossession in a secured product like auto finance.

Chris Willis:

So they care a lot about that. And if you have a daily, simple interest product, it also could result, if it's posted late, in more interest accruing on the credit extension. So the couple of things that they mentioned in the supervisory highlights were first, the allegation that companies posted payments to the wrong accounts, which, again, that's just a flat out error, or here's the more interesting one, posting certain payments as principal only payments instead of applying them to periodic installment payments. In other words, someone made a payment, and instead of saying, oh, this is your next month's due. So I count that as satisfied and now you're not due to the following month. I've advanced your due date. I take that payment, and because of whatever error or system logic I had, I counted it as a principal only payment.

Chris Willis:

And therefore, yes, your principal was lower. I credited the payment, but now you're still due for the next month. And then when you don't make that payment, you get a late fee, you get negative credit reporting, et cetera. And we've seen the bureau focus on this issue as well in previous examinations, although interestingly in the past, we've seen it as the reverse. When companies took large prepayments and applied them to monthly payments as they became due, instead of doing them as principal only payments, the bureau was critical of that in several exams.

Chris Willis:

And so I don't know exactly what they want now, but I think based on the outcomes of those other exams plus what we see in these supervisory highlights, my own belief is the best thing to do is to take payments and apply them to monthly installments to disclose the fact that you are doing that to consumers, and then to give consumers an option to change that if they want to say, oh, I want to keep paying. I don't want to advance my due date. I meant this to be a principal only payment, and give them a clear option to do that.

Chris Willis:

I believe that's what the CFPB wants. And I think the thing that they will react to is when payments are applied and consumers aren't told how they're being applied or given the option to change the application. So that was an interesting issue because we saw it in previous CFPB exams in prior years. The other thing that we saw, and again, this is just basic, getting things right, is that the servicer's website would talk about the allocation of payments between principal interest and fees, and say that the payments would be applied in a certain order. So like let's say I say on my website, it's going to be interest, then fees, then principal. And then according to the supervisory highlights, the servicer actually applied it in a different order.

Chris Willis:

So it would put fees first and then interest and then principal, for example. And that's something that makes a difference to a consumer's financial transaction, because if you put fees first in an allocation, then that means you pay less interest and there's less money left over for payment of principal when the payment begins to be applied, it keeps the outstanding principal balance higher for longer under the term of the retail installment contract, which are universally daily, simple interest products. So guess what? That means there's more interest accrual over the life of the contract. So there definitely are, there are ways to apply payments and allocate them that are more and less consumer friendly.

Chris Willis:

Here though, you don't see the CFPB mandating it. It must be one way or the other. As usual, they come at it from a disclosure standpoint and say, well, look, you said it was A on your website and then it's actually B, so that's a UDAAP violation. Never mind that probably no consumer read or paid attention or took action in reliance on that, but because the actual practice was different from what was disclosed, it's a UDAAP violation. And again, the fact that you apply payments differently than you tell consumers shouldn't surprise anybody that the CFPB would take umbrage of that. That should surprise no one. But what we should really understand here is that the CFPB is focused on payment processing, payment allocation issues, and that is a perennial issue; a very, very high attention in their exams in the auto finance space and in other products too.

Alan Kaplinsky:

Yeah. The final issue that they identified, I want to turn to now, and it deals with ancillary products, and deals with refunds that are made at when an auto finance contract is paid off. And the failure, according to CFPB, to calculate refunds on the ancillary products correctly. I'm wondering before we get to the specific violations, what kind of ancillary products are we talking about, Chris?

Chris Willis:

It's going to be gap insurance or gap waivers, because other ancillary products, like for example, an extended service contract, are really not tied to whether you owe money on your retail installment contract or not. I could have a 10 year extended service contract on my car, pay off my car in three years, and I still want my service contract, right? Those things aren't linked. But gap, by its nature, is only valuable to you while you owe money on your retail installment contract. And so here, what we're talking about is when consumers purchased gap coverage, gap waivers on their contracts, and then pay off early, how they were handled is part of the payoff process. And the thing is, Alan, this isn't new at all. We've seen these ancillary product refund issues in supervisory highlights before over the last several years. And so this is just another iteration of the same issue that we've seen from the bureau before.

Chris Willis:

So the flavor of this summer is that when people paid off early, they would request a payoff quote. Okay, so I'm paying off in year three out of your six of my contract, how much do I need to pay in order to zero myself out? And so the auto finance company knows that there will be a refund of unearned premium, let's call it, on the gap product. But according to the CFPB in this supervisory highlights, the servicer either failed to include the refund amount in calculating the net payoff, or when it calculated the refund that would be coming from the gap coverage, it used the wrong method of calculating the refund and calculated the refund to be smaller than it actually would be.

Chris Willis:

And so ended up telling the consumer a higher net payoff amount than was actually needed to pay off the car, which then after everything settled, presumably the consumer would have a credit balance that would need to be refunded to them. And the CFPB didn't say that it wasn't refunded to them, but they nevertheless found that it was a UDAAP violation to not give the correct net payoff amount with the properly computed refund of the gap product. And so that's what this issue was.

Alan Kaplinsky:

Right. Right, right, right. Okay. Thank you, Chris. Now I want to turn back to Jason. Want to talk about payday lending for a minute. If ever there was a product that was simple to explain to consumers it's a payday loan, a two week loan where you know what you're borrowing, there generally are no ancillary products and payday loans, no credit life or credit disability insurance, that they're generally unsecured. It's easy peasy, right? It's hard to screw up something when you're offering that product, but somehow some companies did. So, Jason, what issues did the CFPB highlight in the payday lending area?

Jason Cover:

Thanks Alan. There's three main highlights here too, which I think are somewhat no brainers and the last one is a little bit more interesting, that the three are misrepresenting regarding a lender's intent to sue, misrepresentations related to no credit check claims. And the final one, which I find more interesting is deceptive repayment, I'm sorry, deceptive presentation of repayment options for borrowers who are contractually eligible for no, I'm sorry, for no cost repayment plans, for verbally known as extended payment plans or EPPs often in the small dollar industry.

Alan Kaplinsky:

So, focusing on the first two. Threatening to sue when there's no intent to sue. I assume... Well, I'll not make the assumption and let me ask you the question. Is there a work around for that, could a company say, we are considering the possibility of suing you if you don't pay it off, or we may sue you, rather than we will sue you. Is that simple or will the CFPB be troubled by each of the formulations that -

Jason Cover:

Yeah, and I think as we all know that the CPB is long held that first party originators collecting their own debt must comply with the spirit of the FDCPA. So it kind of becomes a collection of, well, what would you do if you were a debt collector under the FDCPA. And I'm pretty sure if you ask Chris, should a debt collector say anything about suing people if they didn't intend to sue people, he would say, absolutely not. So I think it's as simple as that in honesty. You just have to stay away from any kind of representation in collections materials no matter whether it is like a big, bold thing that says we're going to sue you, or if it is something more casual of we may pursue other remedies such as suing, so on and so forth.

Jason Cover:

We would generally advise not to do anything like that if you don't actually do it. And I would include like third-party placements, furnishing data to consumer reporting agencies. If you don't do something, and the assertion is intended to get someone to pay you, it's a bad idea, and you'll likely turn up in one of these supervisory highlights, or worse.

Alan Kaplinsky:

So, what was the second one? One was the threatening to sue. There was one other simple one, and then you said the one that's a little more nuanced.

Jason Cover:

Yeah, I think, this is something that I think we have seen clients struggle with. They want to make claims about consumer reports, and particularly in the small dollar space, a lot of entities will use more boutique or smaller, not the big three, right, not experienced, so on and so forth. And then they say, well, we're not doing credit checks. And then they want to make a claim saying no credit check, no credit necessary, things like that. And this is essentially that scenario; the lender had signs posted outside their store saying no credit check necessary, things of that nature. And it's not that, the CFPB didn't tell us what consumer reporting agency or consumer report they're using, but I would almost...

Jason Cover:

I would bet a good amount of money that it was some sort of boutique, subprime type of consumer report and likely the entity was just mistaken about whether it was or wasn't a consumer report. But the bottom line is if you are using, and this even extends to like TeleChek and some of the old school reporting agencies that people used to use. Those are consumer reports. And if you are using anything like that, you can't make claims regarding no credit check, no credit. So anything in this area. And I would include here also like credit voter claims or things like that. I know that's a really popular thing that a lot of our clients want to do, because they're furnishing to consumer reporting agencies, but particularly in the small dollar space, if you're making claims about using credit, reporting credit, furnishing credit or not, you really need to make sure that you're being accurate and that all of your Is are dotted and Ts are crossed.

Alan Kaplinsky:

And so, all right. What about these extended payment plans? What's the issue there?

Jason Cover:

Alan, I think this is something that you read it and on its face seems simple, right? So they are saying essentially, and I assume this was a state where there were mandatory extended payment plans or something to that effect. People would call in, they would say, hey, I can't make my payment this month. And instead of offering the free extended payment plan or some other kind of free extension, they would steer the customer to a refinance transaction for a fee or a rollover or refinance, things of that nature, which is kind of the knock on your short-term payday loan simplicity, I think, that people end up in these strings of rollover refinance transactions, and they don't understand they're going to be in the product for six months, even though a lot of studies have been done showing that people almost exclusively understand how long they'll be in.

Jason Cover:

But this leads to the bigger question, I think, of... and we've seen this from time to time in examinations and things of that nature. CFPB asking questions about, did you... was there another product? Where did you show them that they could get it? But this at the end of the day starts getting back into the cycle of debt that we haven't heard about in a really long time. And this is stemming from enforcements against entities way back in 2014 during the Cordray administration. And if you recall, the industry was just raked over the coals about these types of practices with huge fines coming to several lenders. And it's this steering issue, right, of like we're just going to steer them back into the product, regardless if there is something else that could get them on an off ramp that's free.

Jason Cover:

So it raises the question of in this... the new CFPB, the non-Trump CFPB, which we largely went silent on these issues. I think on some level, the payday loan rule was intended to solve these issues, and I'll talk about that in a second. But are we going to see enforcement related to the cycle of debt? And I think the corollary to this is ability to repay, which is been the hot button topic since, essentially since the formation of the CFPB in this area. So, for all of those that you have been following this, the payday loan role while still stayed is in theory in effect, but the ability to pay portions of it have been rescinded. And this is the front end of the cycle of debt, right? Does someone have the ability to pay or are they being forced into a product that they'll constantly have to roll over and recycle and be caught in this cycle of debt? So, the two things kind of go hand in hand, and the CFPB has tipped their hand a bit that they're concerned about these issues.

Jason Cover:

They know about them. They are certainly not happy with how the rule was handled under the Trump administration. So I think A, are we going to see cycle of debt claims or ability to repay claims in enforcement, other supervision, MRA? And then B, what's going to happen with the rule? Are they, I assume that some action will happen with the rule, but are they going to try to get the ability to repay concepts back in, or is it going to continue to be handled in enforcement from time to time and depending on who the administration is like it was under Obama and Trump administration. So I think this is not a lot of answers here, but I do think this tips the hand as to where the CPB might be going with these things.

Alan Kaplinsky:

So, I know you give a lot of advice to payday lending companies. In fact, at one time, you worked for one a while back. So what kind of practical takeaways are there from what the CFPB is identified here?

Jason Cover:

Yeah, I think for starters if you offer EPP products or free extensions, things of that nature, don't bury them. Just make sure people are aware of them, right? It's made sure that when someone calls in and says, I can't pay today, that the first answer isn't okay, well, let's get you set up for a refund, right? It's okay, here are your options. You choose which one you want to do. It goes hand in hand with what Chris talked about, about how you apply those payments. Where do you want them? It's about consumer choice and disclosure at the end of the day. So if there is an option, they should be aware of it and the choice should be theirs. And then I think on some level it is time to think about analyzing ability to repay.

Jason Cover:

I know at one point I think a lot of folks had, even if there wasn't a state cool down, or some other kind of restriction on payday loans were at least stopping somewhere, right? They would not let you refine and roll over to infinity. They'd stop at six or something. And just in diligencing and seeing what clients are doing, I think people got comfortable and stopped doing that in the last couple of years, which I think in a diligence we would criticize if we saw a string of 24 rollovers or something like that. So, and then we've talked to some clients about other types of things they might do with the ability to repay. It's interesting.

Jason Cover:

Maybe that's jumping to conclusions a little bit, but I think it's time to start thinking about it, even if you're not going to the length that the ATR provisions of the rule described some sort of documentation about how you're thinking about this. And there's some state laws; the FLL and California was one, and I know folks aren't making high interest loans there anymore, but there was a specific requirement to address ability to repay, and it was one of those things we always ask clients, well, what are you doing? And they just kind of shrug their shoulders. But I don't know. I think some documentation in that lines would be useful.

Alan Kaplinsky:

Yeah. Yup. Okay. Thank you, Jason. We've, I think, done a pretty good job and thoroughly covering the three general areas that we covered today. But before we sign off, I'm going to ask both of you whether you have any words of wisdom or parting comments for our audience. And let's go to you first, Chris.

Chris Willis:

The parting comment I would leave the audience with was this was an addition of supervisory highlights that primarily recapped supervisory observations prior to the administration change. And I believe under the new administration, a lot of the things that Jason and I talked about today would have been resolved in enforcement rather than through supervisory means. And we would be hearing about them through consent orders eventually, not through supervisory highlights or maybe both. And so to me, even though a lot of the things that we talked about here didn't seem like such a big deal or so revolutionary, understand that the CFPB resolved them in supervision when it was still resolving a lot of stuff in supervision, and we don't expect that to be the case going forward.

Alan Kaplinsky:

Yeah. Yeah. Good point. Jason, do you have anything to add?

Jason Cover:

No, I'd agree with Chris. A lot of these things are things that had been repeatedly called out in various ways by the CFPB. I don't think any of them are particularly surprising. So, there is unfortunately a new sheriff in town and I think everyone needs to be ready.

Alan Kaplinsky:

Yeah. Yeah, that's for sure. Well, let me thank both of you for taking the time today to enlighten our audience on three key areas. And as I mentioned at the outset of our show today, we have other topics that we're going to cover in future podcast shows related to the supervisory highlights. And let me underscore a point that Chris just made, and that is that these supervisory highlights covered a period ending December 31 of last year. So, that was still under the Kathy Kraninger administration. She was director then. Dave Uejio, who had not been installed as acting director.

Alan Kaplinsky:

And while the highlights themselves were written up by the new CFPB, they really the decisions as to what ought to be done with, whether it should go supervisory or whether it should go enforcement, that was made by the old regime. And the new regime, I absolutely agree with you. They're not going to be as indulgent as the Kathy Kraninger administration. So, with that, thank you, Chris, and thank you, Jason, and I thank all of our listeners today who have downloaded our program.